BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER B. LEEKS	)	
Claimant	)	
	)	
VS.	)	Docket Nos. 1,015,559 &
	)	1,017,345
CITY OF OVERLAND PARK	)	
Self-Insured Respondent	)	

ORDER

Respondent requested review of the November 21, 2006 Award by Administrative Law Judge (ALJ) Robert H. Foerschler. The Board heard oral argument on February 6, 2007.

APPEARANCES

Amanda Pennington Ketchum, of Kansas City, Missouri, appeared for the claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant a 3 percent permanent partial impairment to the whole body[1] for his January 25, 2004 accidental injury[2] and a 9 percent permanent partial impairment to the whole body for his April 14, 2004 accidental injury.[3] He also awarded an additional 3.5 weeks of temporary total disability for claimant's lost work time attributable to the January 25, 2004 accident.

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[1] The Award references "work disability" with respect to both docketed claims, but these claims clearly involve only a functional impairment as there is no evidence within the record that claimant is earning less than his pre-injury wage as a result of his work-related injuries.

[2] This accident is the subject of Docket No, 1,015,559.

[3] This second accident is the subject of Docket No. 1,017,345.

The respondent requests review of two limited issues. First, whether claimant is entitled to an additional 3.5 weeks of temporary total disability (TTD) benefits when claimant refused to perform the light duty offered to him. Second, the nature and extent of claimant's permanent partial impairment attributable to the April 14, 2004 accident. Respondent urges the Board to modify the ALJ's Award to 4 percent rather than the 9 percent reflected in the Award based upon the testimony offered by Dr. Michael J. Poppa.

Claimant argues the ALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award adequately and completely sets forth the pertinent facts and circumstances surrounding these two claims. To the extent that statement is consistent with the findings set forth herein, that statement is adopted by the Board as its own and will not be restated, except to explain the Board's findings.

There is no dispute as to the compensability of claimant's claims. And respondent does not contest that aspect of the ALJ's Award that grants a 3 percent permanent partial impairment to the whole body as a result of the January 25, 2004 accident. Accordingly, that portion of the Award is hereby affirmed. Respondent does, however, take issue with the ALJ's decision to award an additional period of TTD in that same docketed claim.

Respondent maintains claimant was provided with accommodated work, and that it was claimant's decision not to work. And that Dr. Truett L. Swaim's testimony that it was "reasonable" for claimant not to work during that period is unpersuasive.[4] Respondent argues that K.S.A. 44-510c(2) requires competent medical evidence to support an injured employee's inability to work "on account" of the accident. Here, respondent maintains that Dr. Swaim was not the treating physician and is not informed enough as to those details to determine whether claimant was truly unable to work due to the accident.

While claimant concedes that accommodated work was made available to him, he indicates he was not able to work at all times following his first injury, in spite of his limited duty release on March 17, 2004.

The difficulty in evaluating the parties' arguments is that the evidence as to claimant's need to remain off work *due to his injury* remains largely unexplored. There are documents which show how many hours claimant was compensated for during the relative

[4] Swaim Depo. at 10.

dates at issue. These records reflect a great deal of time designated as "leave without pay" along with sick leave, personal holidays, as well as time off designated as "workers compensation". The hours designated as "workers compensation" far exceeds the .86 of a week claimant was admittedly paid by respondent. All of this is complicated by the fact that none of the records generated by claimant's treating physicians are included within the record and available for consideration.[5] Thus, the Board is left with only the testimony provided by the two testifying physicians, Drs. Swaim and Poppa. Dr. Poppa is silent on the need to be off work while Dr. Swaim merely testified that it was reasonable for claimant to be off work and that he would not take issue with such a determination.[6]

To further complicate matters, claimant's own testimony is, at best, vague as to how much time he lost due to his first accident.

> Q. (By Ms. Ketchum) Prior to the time that you just mentioned that Dr. Finley released you, was there a time period where you were unable to work?
> A. Yes.
> Q. And were you compensated by your employer during that time off of work?
> A. No.
> Q. Do you know the dates that you were not able to work and that you were no compensated?
> A. Not quite clear on that. But I know between the month of the injury until the time I went back.[7]

The Award indicates at one point claimant is entitled to an additional 17 days of TTD[8]. But then at page 8 the ALJ notes 96.5 hours or 12 days from January 31, to April 2, 2004 were designated as 'workers compensation" time off. "So it seems appropriate to also award Mr. Leeks 12 days of temporary total disability in addition to the 6 days stipulated as paid as [of] the prehearing settlement conference, February 1, 2006. So the combination of 18 days is included for temporary total disability with the award (the 6 days paid are to be credited to that on payment.)"[9]

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

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[5] Following the regular hearing, claimant's counsel submitted her formal submission letter and attached a great deal of medical records and photographs. But this attempt to introduce such medical records was rejected in the Award and that finding is hereby affirmed. (See ALJ Award at 6.)

[6] Swaim Depo. at 10.

[7] R.H. Trans. at 9-10.

[8] ALJ Award (Nov. 21, 2006) at 6.

[9] *Id.* at 8.

right depends.[10] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[11]

In this instance, the Board has considered the parties' arguments and the exhibits and testimony offered by the parties and concludes that claimant has failed to meet his burden of proof on the issue of additional TTD benefits. Claimant himself is unclear as to how much time he was off work following his first accident. And Dr. Swaim, the only physician to speak to this issue, was not involved in claimant's care. Although that fact alone does not invalidate Dr. Swaim's opinion, it would certainly have been more persuasive to have claimant's treating physician testify as to the need for claimant to be off work or better yet, to have claimant adequately testify as to the dates he was unable to work due to his injury. The time records do not substantiate the reason behind claimant's absence at work. In fact, they seem to suggest that there were a variety of reasons claimant was off during the relative period, including vacation, leave without pay and sickness. Absent more information to explain which days claimant was absent from work due to his injury, the Board cannot make the inferential leap claimant is hoping for. Accordingly, the Board reverses the ALJ's award of 3.5 weeks of additional TTD.

The second issue in this appeal stems with the ALJ's evaluation of the nature and extent of claimant's impairment arising out of Docket No. 1,017,345. In this second accident claimant aggravated his mid-back condition (from the first accident) and also sustained a left foot crush injury. The testifying physicians both agree his permanent partial impairment to the mid-back is 2 percent to the whole body. But, those physicians do not agree as to the lower leg impairment rating.

Dr. Poppa assigned a 5 percent to the lower extremity at the level of the ankle for what he diagnosed as a soft tissue contusion with remaining physical complaints. When converted, this yields a 2 percent to the whole body and combined with the 2 percent whole body impairment for the mid-back, the result is 4 percent to the whole body.

In contrast, Dr. Swaim assigned a 10 percent impairment for what he described as a left foot crush injury along with an additional 15 percent for claimant's ankle instability. When these figures are converted they result in a 10 percent impairment to the whole body, and yield a 12 percent whole body when combined with the mid-back permanent impairment.

In his Award, the ALJ stated the following:

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[10] K.S.A. 44-501(a).

[11] K.S.A. 44-508(g).

> By the time Dr. Poppa saw him later, some of the ankle complaints and symptoms had appeared to have subsided, leading him to a lower assessment of that impairment. Still Dr. Swaim, though now only doing examinations, practiced many years as a reliable orthopedic specialist and his differing opinion should not be ignored. So it would seem fair to consider claimant's left lower extremity impairment as 10 percent, to be combined with the total general impairment for the back from the April 14, 2004 injury, increasing it to 9 percent and leaving its further improvement, if necessary, and desirable, for the future medical treatment.[12]

The Board has considered the facts and circumstances and concludes this aspect of the Award should be modified. It is unclear precisely how the ALJ arrived at a combined impairment rating of 9 percent to the whole body. After a close examination of Drs. Poppa and Swaim's opinions, the Board concludes that neither physician's opinions are any more persuasive than the other. As noted by the ALJ, Dr. Poppa saw claimant somewhat later than Dr. Swaim. And this might account for the diversity between their opinions. In any event, the Board will average the two opinions of these physicians and find that claimant sustained a 15 percent to the left lower extremity at the level of the ankle. When that figure is converted, it yields a 6 percent permanent partial impairment to the whole body. And when that figure is combined with the 2 percent to the whole body for the back injury, the result is 8 percent permanent partial impairment to the whole body. The Award is hereby modified to reflect this 8 percent impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated November 21, 2006, is modified as follows:

FOR DOCKET NO. 1,015,559

The claimant is entitled to 12.45 weeks of permanent partial disability compensation at the rate of $293.35 per week or $3,652.21 for a 3 percent work disability, making a total award of $3,652.21.

As of February 14, 2007 there would be due and owing 12.45 weeks of permanent partial disability compensation at the rate of $293.35 per week in the sum of $3,652.21 for a total due and owing of $3,652.21, which is ordered paid in one lump sum less amounts previously paid.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

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[12] ALJ Award (Nov. 21, 2006) at 7.

FOR DOCKET NO. 1,017,345

The claimant is entitled to 33.20 weeks of permanent partial disability compensation at the rate of $293.35 per week or $9,739.22 for a 8 percent work disability, making a total award of $9,739.22.

As of February 14, 2007 there would be due and owing to the claimant 33.20 weeks of permanent partial disability compensation at the rate of $293.35 per week in the sum of $9,739.22 for a total due and owing of $9,739.22, which is ordered paid in one lump sum less amounts previously paid.

The Board notes that the ALJ expressly stated there was no attorney fee contract filed with the Division for Gary Rappard, claimant's former counsel, and that upon receipt of the contract Mr. Rappard's lien for his fees filed on October 27, 2004 would be addressed. Upon further investigation, the Board has identified the fee contract between the claimant and Mr. Rappard which was filed on June 17, 2004. And although the ALJ has approved the fee contract for claimant's current counsel, Ms. Ketchum, K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Therefore the issue of Mr. Rappard's lien, needs to be resolved before any attorney's fees can be paid.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of February, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Amanda Pennington Ketchum, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent, a qualified self insured
Gary D. Rappard, Attorney at Law
Robert H. Foerschler, Administrative Law Judge